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HARVARD LAW REVIEW

Published monthly, during the Academic Year, by Harvard Law Students

SUBSCRIPTION PRICE, $3.00 PER ANNUM . . . . . 50 CENTS PER NUMBER

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THE ESPIONAGE ACT AND THE LIMITS OF LEGAL TOLERATION.[a] — The sharp discussion which has been aroused by the numerous convictions under the Espionage Act of 1917 [1] is much clarified by such a preliminary statement of the precise issues involved as that of Hand, J., in the case of *Masses Pub. Co.* v. *Patten*.[2] False statement of fact apart, the statute speaks only of crimes and "attempts." Expressions of opinion and exhortations to be punishable must therefore contain the ingredients of an attempt,[3] namely: 1. A specific intent to commit the substantive crime; 2. A certain proximity to success. No doubtful question of constitutional law is involved.[4] The controversy becomes one as to definitions of criminal attempts, and reduces itself primarily to criticism of charges to the jury in the district courts.

Since a trial judge must act unaided in the first instance, it is impracti-

[a] An article taking the other view will appear in the February number. — Ed.

[1] Act of June 15, 1917, c. 30, Title I, § 3; 40 U. S. STAT. AT L., 219.

[2] 244 Fed. 535 (S. D. N. Y., 1917). He says "It must be remembered at the outset . . . that no question arises concerning the war power of Congress. It may be that the fundamental personal rights of the individual must stand in abeyance, even including freedom of the press . . . though that is not the question. Here is presented solely the question of how far Congress . . . has up to the present seen fit to exercise a power which may extend to measures not yet even considered but necessary to the existence of the state as such."

[3] The term "attempt" is used to include attempts by words alone, *i. e.*, "incitements."

[4] It is believed to be unquestioned that punishment for incitement is not prohibited by the First Amendment. See *infra*, note 16.

cable for the upper court subsequently to demand adherence to a single rigid formula or set of words. It is submitted that there is nothing damning *per se* in the use of such expressions as "inferred" or "presumed" intent. All facts must be inferred from the evidence presented. Such a "presumption" is legitimate, provided the jury understand that it is not conclusive,[5] and is one of fact not law.[6] Nor is there anything inherently vicious in the use of "natural tendency and reasonably probable effect" in defining the degree of proximity to success necessary to constitute an attempt.[7] The charge in the Debs case made use of similar expressions.[8] It was affirmed by a united court, and Justice Holmes in delivering the opinion specifically approved of the charge.[9]

When we turn to convictions under the Espionage Act as amended May 16, 1918,[10] new issues are involved: first, of interpretation; second, of constitutionality. Obviously Congress intended to increase the field of criminal utterances. How has it done so? 1. By adding new substantive offenses. 2. By making the willful expression of certain disloyal utterances criminal *per se;* and thereby apparently abandoning in such cases the requirement of proximity to success, and possibly also of specific intent which are necessary to constitute an attempt. In the main, district courts appear to have insisted upon the necessity of these elements since the amendment as before. But this as a matter of statutory construction seems unwarranted. And at least one notable exception exists. In *United States* v. *Curran*, Learned Hand, J., recognizes the change made in this respect.[11] Nor, it is worth observing, did he seem to doubt the constitutionality of this change, which it was open to him to question. As yet the decisions are not numerous; but there have been a certain number in lower federal courts,[12] and a case has at last come up for review by the Supreme Court.[13]

In that case the defendants were convicted for printing and distributing in New York City two leaflets, in violation of the Espionage Act, as amended May 16, 1918. The leaflets, after denouncing the government, appealed to Russian workers in America to cease to render assistance in the war, and to rise and prevent the intervention of America against the revolutionary government in Russia. Workers in munition factories were urged to cease the production of "bullets to murder their dearest"; and

[5] See Wolverton, J., in United States *v.* Floyd Ramp, INTERP. OF WAR STAT. BULL. No. 66 (D. C. Ore., 1917).

[6] See Bean, J., in United States *v.* Equi, INTERP. OF WAR STAT. BULL. No. 172 (D. C. Ore., 1918).

[7] It is a question of degree, to be determined in each case upon the special facts of that case. See J. H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 501.

[8] United States *v.* Debs, INTERP. OF WAR STAT. BULL. No. 155 (D. C. N. D. Ohio, 1918).

[9] Debs *v.* United States, 249 U. S. 211, 39 Sup. Ct. Rep. 252 (1919).

[10] Act of May 16, 1918; U. S. COMP. STAT., 1918, § 10212 *c*.

[11] INTERP. OF WAR STAT. BULL. No. 140 (Dist. Ct. S. D. N. Y., 1918). "Mr. COTTON: Is not intent necessary in both these? The COURT: On the 3d count the intent to persuade is necessary. The utterance of the words themselves is sufficient in the other two, they being if uttered unloyal words." *Idem*, at p. 6.

[12] The following is a list of reported cases on indictments under the amended Act: INTERP. OF WAR STAT. BULL. Nos. 131, 140, 143, 149, 155, 157, 168, 169, 172, 183, 185, 189, 191, 202.

[13] Abrams *v.* United States, U. S. Sup. Ct., October Term, 1919, No. 316 (November 10, 1919).

a general strike was advocated as the necessary "reply to the barbarous intervention" in Russia. The fourth count of the indictment charged, in the language of the Act, a conspiracy to advocate curtailment of production of munitions.[14] The defendants claimed that the evidence was insufficient to support the verdict. The Supreme Court affirmed the conviction, Holmes and Brandeis, JJ., dissenting.[15]

The case restricts the issue to a narrow field. The facts render unnecessary an inquiry into the requirements of the statute as to the proximity-to-success element.[16] And the offense charged, though not an "attempt," was nevertheless under a clause of the statute which required a specific "intent . . . to cripple or hinder the United States in the prosecution of the war." The question of constitutionality seems therefore essentially the same as in cases of conviction under the original Act.[17] Moreover there appear to have been no exceptions urged to the charge by the court below. The question of law before the Supreme Court was whether there had been sufficient evidence to sustain the verdict, the only doubt being as to the evidence of the necessary intent.

It is urged in the dissenting opinion that manifestly the sole object of the leaflets was to stop American interference in Russia: that any hindrance of the United States in the conduct of the war was an indirect effect of their publication; one not desired for its own sake, not the "proximate motive" of the act; and that therefore the necessary intent to hinder was lacking.

It is true that a wanton and conscious disregard of the probability of hindering would not satisfy the specific intent to hinder, required by the statute. But surely the conscious disregard of the certainty of hindering does so.[18] In other words, "when words are used exactly,"[19] a man intends not only those consequences of his act which he desires for their own sake, but also those which he is conscious must inevitably result from his act, *if the desired consequence is to be achieved*.[20] The first physical

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[14] The portion of the statute involved reads in part: "Whoever, when the United States is at war, shall willfully . . . advocate any curtailment of production in this country of any thing or things . . . necessary . . . to the prosecution of the war . . . with intent by such curtailment to cripple or hinder the United States in the prosecution of the war, . . . shall be punished," etc. U. S. COMP. STAT., 1918, § 10212 *c*.

[15] See RECENT CASES, p. 474.

[16] It is admitted in the dissenting opinion that the distribution of the leaflets broadcast in New York would have constituted a sufficiently dangerous proximity to success to satisfy the requirements of an attempt.

[17] The constitutionality of the Act of 1917 has been repeatedly affirmed. Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247 (1919); Frohwerk *v.* United States, 249 U. S. 204, 39 Sup. Ct. Rep. 249 (1919); Debs *v.* United States, 249 U. S. 211, 39 Sup. Ct. Rep. 252 (1919); Sugarman *v.* United States, 249 U. S. 182, 39 Sup. Ct. Rep. 191 (1919).

[18] To illustrate: William Tell, instead of removing the apple from his son's head, unfortunately kills the youth. Strictly the killing is not intentional. There was a conscious disregard of dangerous possibilities, only. 2. Suppose that the target assigned him had been his son's heart, not the apple. He attains the target, and the son dies. Clearly the killing is intentional. Considerations of motive are of course immaterial. 3. The target is the apple, but it is placed directly over the son's heart. The apple is hit, and incidentally but inevitably the boy killed. Can defendant Tell be heard in logic or justice to plead that the killing was unintentional?

[19] The quotation is from the dissenting opinion in the principal case.

[20] If not, one who knocks A down in order to step across his body and strike B,

consequence in the chain of those specifically desired by the defendants would have been a decrease in the production of munitions. Such a result would necessarily, in and of itself, have constituted a hindrance to military operations against Germany.[21] Of this the defendants, unless insane, must have been aware. Therefore they intended "to hinder the United States in the prosecution of the war." Similarly an intent to kill one's daughter's suitor is unescapably included in an intent "to look upon his body chopped particularly small." [22] Since the state of mind necessary to complete the crime may be found without tracing beyond the point indicated the chain of desired consequences, the mental attitude of the defendants toward more distant consequences becomes immaterial.

It is submitted, therefore, that the decision in the principal case is sound.

As already observed, no issue of constitutional law seems involved. Constitutional questions of no mean interest are, however, suggested by it and the other espionage cases. An article in a recent number of this REVIEW deals at length with the relation of the constitutional guaranty of free speech to such war legislation.[23] It is there suggested that the social theory embodied in, and imposed upon us by, the First Amendment [24] may be crystallized into a rule of law. Subject to the existing law of Defamation and Fraud, freedom in the expression of opposition to the aims, laws, or structure of our government may be abridged only when such utterances would, by the rules of the common law, constitute attempts or incitements to commit substantive crimes against the government. Like the Constitution itself, the rule should persist in time of war, as in peace. This conclusion is based upon an historical investigation which demonstrates that the amendment was aimed not merely, as conceived by the Blackstonian definition, at prior governmental censorship, but also at such subsequent censorship by prosecutions for seditious libel as was then practiced in England. The amendment is found to be the expression of a broad principle of political faith: that unfettered expression of ideas, because essential to the slow progress toward ultimate truth, is a social interest to be zealously protected from abridgment. And this political tenet, though based on the need to question all things, shall, the amendment ordains, itself remain unquestioned.

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intended to strike A, since the desire to reach B is but the motive for striking A. Yet one who reluctantly fires a bullet through his friend A as the only possible way of hitting B, did not intend to shoot A. A distinction so repugnant to common sense discredits a definition of "intent" which entails it. If intent connotes desire, surely the desire includes all consequences essential to the achievement of the desired consequence.

[21] In an attempt the specific intent required is only to produce some result which if achieved would constitute a substantive crime. See BISHOP, CRIMINAL LAW, 8 ed., § 731. That is, in the present case, though an intent to publish would not be enough, an intent to produce any consequence which would in fact be a hindrance, *i. e.* curtailment in the production of munitions, would be enough. It is worth noting that the statute, therefore, by requiring an actual intent "*to hinder*," demands even more than the specific intent necessary to constitute an attempt. See J. H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 493.

[22] W. S. GILBERT, THE BAB BALLADS: "Alice Brown."

[23] Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932.

[24] "Congress shall make no law . . . abridging the freedom of speech or of the press," U. S. CONSTITUTION, AMENDMENT I.

If we grant the inadequacy of the Blackstonian doctrine,[25] if we admit and admire the clear exposition of the social theory which underlies the First Amendment, must we therefore subscribe to the rule of constitutional law deduced therefrom?

At the outset it should be noted that the rule presupposes that a "clear and present danger of success" is invariably the measure of that "dangerous proximity to success" necessary to constitute an attempt.[26] This seems questionable.[27] The degree of proximity required varies from offense to offense, and depends upon the gravity of the crime attempted and the special facts of each case.[28] The phrase "dangerous proximity to success" has only acquired meaning in the case of specific offenses by a process of exclusion and inclusion; as the result of a series of cases dealing with attempts to commit a particular crime.[29] The want of such blocking out by judicial decision is precisely the troublesome factor in the case of those crimes to which the rule is sought to be applied.[30]

But whether a clear and present danger of success be a necessary ingredient of all attempts or not, to maintain that the rule marks a sharp line which Congress may not transgress, may not even transgress by virtue of the war power, is, it is believed, untenable.[31] The First Amendment is an expression of political faith; not a prohibition which can be defined by mere interpretation of the language employed. The policy to which it commits us is one of toleration; of recognition of the "relativity of values." But legal toleration pushed to its ultimate conclusion becomes impotence, self-destruction. We may not believe that the truths we hold are immutable, but for some of them at least we must stand ready to fight. Somewhere we must be willing to put our back against the wall of opinion, or existence becomes impossible. The law must resist its own destruction. Thus, though we may readily conceive that the overthrow of our government by force might well produce a bettered social order, yet the law must punish such action, must thwart the appreciated possibility of the attainment of new and better truths. So too, logically, must it condemn all acts or utterances aimed at such subversion, or tending solely thither. It must do so, not because sure of

[25] See Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 651; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 596 *et seq.*

[26] Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 967.

[27] In Masses Pub. Co. *v.* Patten, 246 Fed. 24 (C. C. A. 2d C., 1917), the judges of the Circuit Court of Appeals appear to have taken this view. In the case of a conviction under the original Act, and hence necessarily for an "attempt," they substitute "natural and reasonable effect" as a measure of the degree of dangerous proximity to success required.

[28] See Holmes, J., in Commonwealth *v.* Kennedy, 170 Mass. 18, 20, 48 N. E. 770.

[29] See J. H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 501.

[30] This point is commented on at length by the learned author. See Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 942 *et seq.*

[31] This the learned author at one point in his argument seems himself to admit. See Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, at 963. If the test proposed punishes agitation at its "boiling point" — yet Congress may go further back and punish at a point which is "hot" though not at one which is "merely warm" — then the test is not one of constitutionality at all. We are faced, unaided, by a question of degrees of heat; and the true constitutional rule is yet to be ascertained.

the eternal rightness of its own doctrines, but because the law must believe that law is better than no law, that its own preservation is better than its own destruction. Now it is true the First Amendment is a binding adjudication that freedom of speech is a thing of great social value.[32] But the why and the wherefor thereof must be considered. Freedom of speech is of social value, apart from its gratification of the individual's desire to have his say, because it permits thought to get itself accepted at the bar of public opinion; and, by becoming actuality, to benefit society. This reason ceases to exist when that actuality would be of the sort which we have seen the law must prohibit, irrespective of ultimate merits.

It is conceived, therefore, that the guaranty of the First Amendment extends only so far as the reason behind the guaranty demands; and that it does not inhibit the suppression, whenever reasonably necessary, of utterances whose aims render them a menace to the existence of the state. In the case of such utterances it is for Congress to judge, in the light of existing conditions, whether of war or peace, as to the kind and amount of repression necessary.[33] Unless palpably unreasonable, the decision of Congress should be respected by the courts.[34] If we are to deal in realities, it is believed no more specific definition is possible. To limit the state's right of self-protection to the punishing of attempts and incitements is purely arbitrary.[35] There is nothing in the policy imposed by the amendment, as construed in the light of the reason underlying that policy, to indicate such an intention.

How far behind the point of actual success it is wise or effective to go in punishing utterances that are beyond the pale of constitutional protection is a question worthy of deep consideration.[36] But within the field of its discretion Congress is sole judge of the political expediency of its own acts. Those who have often condemned judicial refusal to give

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[32] But *that* social interest may be outweighed by others; activities necessary to the preservation of morals or the safety of the state, for instance. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 445, 456. Compare the Civil War "free speech" case, *Ex parte* Vallandigham, 1 Wall. (U. S.) 243 (1863) and *idem*, 28 Fed. Cas. 874 (1863).

[33] Compare the now settled right of Congress to decide that conscription is a necessary method of raising an army, despite the provisions of the Thirteenth Amendment. Arver *v.* United States (Selective Draft Law Cases), 245 U. S. 366 (1917). *Cf. Ex parte* Vallandigham, *supra*, note 32. See Martin *v.* Mott, 12 Wheat. 19 (1827); McCulloch *v.* Maryland, 4 Wheat. 316 (1819). See also Ambrose Tighe, "The Theory of the Minnesota 'Safety Commission' Act," 3 MINN. L. REV. 1; and C. H. Hough, "Law in War Time — 1917," 31 HARV. L. REV. 692.

[34] See THAYER, LEGAL ESSAYS, 1–41.

[35] It is submitted that the power of Congress to legislate at all upon such matters, *i. e.* apart from the question of express constitutional prohibition, rests upon the right of self-protection. The Constitution recognizes this right by according, in normal times, the power "to make all laws necessary and proper . . . " etc.; by according, in abnormal times, the "war powers." See H. W. Biklé, "The jurisdiction of the United States over Seditious Libel," 41 AM. L. REG. (N. S.) 1.

[36] Bad teachings cannot be overcome by force. Neither is repression a cure for grievances. Yet war is a jealous mistress; and the catchword, "during the present emergency," was then no empty phrase; while even to-day one must be blind not to perceive the danger to civilization itself from what Mr. Gilbert Murray has called "the monstrous and debauching power of the organized lie." See an admirable article on this point in Vol. I, No. 30, THE REVIEW, p. 634 (December 6, 1919).

effect to so-called "liberal" legislation, because the refusal seemed to them based upon individual opinions of desirability, should not reverse their position now that the shoe pinches on the other foot.

It may be objected that the line of reasoning suggested reduces the First Amendment to a nullity. This is untrue. The reason behind the safeguard excludes from its protection only those utterances whose aim or obvious tendency is toward methods of change which the law cannot sanction: only those utterances, that is, whose aim is to subvert the government and the law, either directly, as by revolt; or indirectly, as by assistance to a foreign enemy in time of war. But there remains within the protection of the guaranty unfettered advocacy of any change, provided only it be by lawful means. The most humiliating censure of the administration; bitter and intemperate criticism of a public official to prevent reëlection or procure impeachment; attacks upon the form of government itself to induce amendment — as to these the hands of Congress are tied. No conviction that the ultimate objects were fraught with disaster would permit Congressional interference. Yet the English law of Seditious Libel could have found therein food for prosecutions. The line may be indefinite, — all lines are hard to draw, — it is none the less real.[37] It differentiates between utterances, in the language of Best, J., according as they would result in "setting the government in motion for the people or setting the people in motion against the government." [38] And it must not be forgotten that, in the case of the latter, the power, not the wisdom, of repression is alone under discussion.

Finally there remain in addition those guaranties which have now sufficed to insure the free exchange of ideas in England for over a half-century. Whatever new test of criminality Congress may enact, the final application of that test rests in the hands of the jury. There it may safely be left. Of whatever lapses our "twelve good men and true" may have been guilty on specific occasions, they are too typical a feature of our legal system, are too ingrained in its very structure, to be condemned without mature reflection. They are drawn from the people. Their opinion may be considered representative of public opinion in general. And that public opinion in this matter should rule is in full accord with the spirit of our government. For it must be remembered that the First Amendment means what it was intended to mean at its inception, not what some of us might think it wise that it should mean to-day. And does not history show us that its primary object was to protect the people against the government, the master against his servant, rather

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[37] The unwillingness of courts to question the constitutionality of the Act is perhaps an indication of tacit acquiescence in the view suggested, since under that view the clauses of the Act which have so far come up for consideration seem clearly constitutional. Note the remarks of Justice Holmes in the Schenck case: "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249 (1919). See also the remarks of Hand, J., quoted *supra*, note 2; and his assumption of the constitutionality of the Amended Act in United States *v.* Curran, *supra*, note 11.

[38] See Rex *v.* Burdett, 4 B. & Ald. 95, 132 (1820).

than to protect a few of the people against the force of public opinion, the master against his fellow masters? [39]

There are those to whom all of the foregoing will seem but safeguards of straw; who will feel that to admit that Congress in this matter can be completely circumscribed by no clearly drawn line is to sacrifice all. For them there is perhaps some bitter consolation to be had from the opinion of a famous champion of free speech, Alexander Hamilton: "What is the liberty of the Press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government." [40] D. K.

SEPARATE AND DISTINCT PENALTIES FOR WOMEN. — A survey of the statutes establishing reformatories for women in the United States under a system imposing indeterminate sentences for offenses punishable in the case of men with determinate sentences, showed two years ago that the example set by Indiana in 1869 had been followed more or less closely by seventeen other states.[1] In that study it is stated that the constitutionality of these laws had never been seriously questioned. The question has finally been raised, however, in *State* v. *Heitman*,[2] and the Act in question has been upheld.

The opinion is interesting because it takes congizance of some of the newer movements in criminology. "Crime," says the court, " is no longer treated abstractly according to the *a priori* method, and punishment no longer consists of penalties sawed into stock lengths and corded up by the judge's bench for use in passing sentence. . . . The study of crime, not neglecting the social factor, becomes largely the study of individuals." Apparently the court welcomes the tendency toward the individualization of punishment — though it is an individualization in which the court will have but little part beyond passing on its constitutionality. Saleilles, whose work laid the ground plan for the more recent discussions of the subject, divides individualization into three classes: Legislative (the English translation says "Legal"), Executive, and Judicial.[3] According to him, the first of these is not individualization at all; it is at best classification in the direction of individualization. Executive individualization, taking place after sentence, represents a method of undoing legislative and judicial blunders. Judicial individualization is the kind he advocates. The statute under consideration, however, is not only limited to legislative and executive individualization, but is antagonistic to that limited discretion of the judge which ordinarily lies between maximum and minimum sentences. The legislature makes the general classification (in this case on the basis of sex), and leaves to the

[39] J. R. Long, "The Freedom of the Press," 5 VA. L. REV. 225.
[40] HAMILTON, THE FEDERALIST, 631, 632. See 16 HARV. L. REV. 55.

[1] See Helen Worthington Rogers and Marion Canby Dodd, "A Digest of Laws Establishing Reformatories for Women in the United States," 8 J. OF CRIMINAL LAW AND CRIMINOLOGY, 518–553.
[2] 181 Pac. (Kan.) 630 (1919). See RECENT CASES, p. 473.
[3] See SALEILLES, THE INDIVIDUALIZATION OF PUNISHMENT, 1898 (Eng. tr. 1911).